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In The

Supreme Court of the United States

October Term, 1994

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

DALLAS R. CHEESMAN and MAGARET J. CHEESMAN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What is the appropriate test for determining "undue hardship" for debtors seeking exemption form the nondischargeability of student loans under 11 U.S.C. § 523(a)(8)(B)?

2. Does a bankruptcy court have the power under 11 U.S.C. § 105(a) to indefinitely delay a determination of the dischargeability of a student loan under 11 U.S.C. § 105(a)?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner urges that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 2, 1994 and the order denying petition for rehearing and rehearing en banc entered on August 4, 1994. That opinion is yet to be reported but is set forth at pages 1a through 15a of the Appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

I. Proceedings Below

The debtors, Dallas and Margaret Cheesman, filed a Chapter 7 petition with the United States Bankruptcy Court for the Middle District of Tennessee on August 2, 1991. The debtors' Statements and Schedules, which were filed with the court, listed approximately $6,500.00 in secured debts and $23,500.00 in unsecured debts. On November 20, 1991, the debtors filed an adversary proceeding seeking to discharge $14,267.18 in educational loans owed to the Tennessee Student Assistance Corporation (TSAC) pursuant to 11 U.S.C. § 523(a)(8)(B). Thus, the debtors sought to discharge more than 60% of their unsecured debt on the ground that repayment of those student loans constituted an "undue hardship" within the meaning of the statute.

After a hearing and upon stipulated facts, the bankruptcy court held on April 21, 1992 that "excepting the educational debt from discharge would cause undue hardship for the plaintiffs at this time." (App. at 21a). Nevertheless, the bankruptcy court held that "because of potential for employment and future improvements in the plaintiffs' financial situation, the matter should be placed on the docket and called up for review in eighteen months." (App. at 21a). Thus, the determination of whether repayment of the student loans constituted "undue hardship" upon the debtors was delayed for at least eighteen months at which time the debtors' financial situation would presumably be reevaluated.

TSAC filed an appeal with the district court on April 29, 1993, and the district court entered an order affirming

the bankruptcy court. In its memorandum opinion, the district court observed that "a very serious question [exists] as to whether the statute [11 U.S.C. § 105(a)] grants to the bankruptcy court the power to stay the final question of dischargeability of these debts to a later date." (App. at 19a). The district court reluctantly decided to accept the "expansive view" of the bankruptcy court's powers under 11 U.S.C. § 105(a) and "affirm[ed] the exercise of the bankruptcy judge's discretion" in this case to delay the determination of the dischargeability of these student loans for eighteen months. (App. at 20a). The district court nonetheless observed that it "might have made a different determination as to dischargeability of these particular student loans, in view of Congress' concern about their collection." (App. at 20a).

TSAC filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. By a majority of 2-1, the Sixth Circuit affirmed the decision of the bankruptcy court stating that "[t]he bankruptcy court properly held that the Cheesmans' student loans were dischargeable pursuant to 523(a)(8)(B) because the loans imposed an undue hardship." (App. at 10a). In addition, the majority stated that "[t]he [bankruptcy] court properly stayed its discharge order pursuant to the court's 105(a) equitable authority." (App. at 10a). Judge Ralph B. Guy, Jr. dissented from the majority on both issues stating: (1) "I would find the undue hardship requirements have not been met"; (App. at 15a) and (2) "[w]hile 105(a) grants bankruptcy courts broad equitable powers, I do not believe this includes the power to effectively postpone a decision as to the dischargeability of a student loan." (App. at 15a).

II. Facts Relevant To Petition

In 1983, the debtor, Margaret Cheesman, received two educational loans to attend Middle Tennessee State University (MTSU) totalling $5,000.00. Subsequently, Ms. Cheesman was awarded a bachelor of arts degree in 1984 from MTSU where she majored in English. Ms. Cheesman's loans first came due on June 25, 1985 at which time she was obligated to make a monthly payment of $68.00. Ms. Cheesman made only two payments of $50.00 each on these loans in 1990. (App. at 25a). As a result of Ms. Cheesman's failure to make payments, TSAC brought suit in the Cumberland County General Sessions Court for $9,164.37. which constituted the balance of the loan, interest and attorneys' fees. Judgment was entered in favor of TSAC on April 9, 1991. (App. at 26a).

In February of 1985, the debtor, Dallas Cheesman, obtained an educational loan in the amount of $3,500.00 to attend MTSU to study educational psychology. Mr. Cheesman had previously obtained a bachelor of science degree in biology and geology from another public university in Tennessee in 1974. Mr. Cheesman withdrew from MTSU in 1985 in order to take a second job. On December 1, 1985, Mr. Cheesman's loan came due payable at the rate of $54.55 per month. As with Ms. Cheesman, Mr. Cheesman only made two payments on the loan in the amount of $50.00 each in 1988 (App. at 25a).

The debtors filed a Chapter 7 bankruptcy petition in August of 1991. At that time, the debtors owed on their student loans to TSAC a total amount of $14,267.18. These student loan debts represent a substantial part of the debtors' total debt (over 60% of the unsecured debt).

During the pendency of this appeal, the debtors filed a motion to delay entry of their discharge stating that "[b]ecause most of their debts are student loans, a discharge [in this case] would prove meaningless and wasteful." (App. at 31a). Thus, the primary motivation of the debtors to file this Chapter 7 case appears to be to discharge the student loans owed to TSAC.

At the time this Chapter 7 case was filed, Mr. Cheesman was employed as an early intervention specialist by a mental health center where he earned an annual gross salary of $13,478.40. (App. at 27a). At the hearing, Mr. Cheesman testified that there was a possibility of obtaining a promotion in the near future. Until February 29, 1992, when funds for the program ran out, Mr. Cheesman also earned $200.00 per month working part-time for a local adolescent drug prevention program. Although Ms. Cheesman was not employed at the time of the hearing, she is qualified to teach at private schools in Tennessee and to substitute teach at Tennessee public schools. (App. at 27a). Ms. Cheesman was employed on a part-time basis in 1989 through 1991 as a teacher's aide in a public school with a gross annual salary of $7,182.00. In 1991, the debtors' annual gross income was $15,676.00. The debtors list their average monthly expenses at $1,594.50. (App. at 27a). The debtors have no medical problems and are covered by health insurance through Mr. Cheesman's employer, (App. at 28a-29a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CONFUSION IN THE LOWER COURTS AS TO THE APPROPRIATE TEST FOR DETERMINING AN "UNDUE HARDSHIP" FOR DEBTORS SEEKING EXEMPTION FROM THE NONDISCHARGEABILITY OF STUDENT LOANS UNDER 11 U.S.C. § 523(a)(8)(B).

A. Congressional Intent Regarding 11 U.S.C. § 523(a)(8)(B)

It is important for this Court to hear this case in order to ensure that the intent of Congress with regard to 11 U.S.C. § 523(a)(8) is being fulfilled by the lower courts. The lower court decision in this case runs contrary to that legislative purpose by establishing a relatively easy standard for the dischargeability of student loans. Where the intent of Congress is being ignored by a lower court as in this case, this Court should intervene to judicially affirm the national legislative policy of strictly limiting the dischargeability of student loans in bankruptcy.

The Guaranteed Student Loan Program (now known as the Federal Family Education Loan Program (FFELP)), which was established as part of the Higher Education Act of 1965, was designed to ensure that colleges and students attending colleges would have reasonable access to low interest rate loans. S. Rep. No. 673, 89th Cong., 1st Sess. (1965), reprinted in 1965 U.S.C.C.A.N. 4027, 4030. *See also* Jerome M. Organ, Recent Development, 38 VAND. L. REV. 1087, 1089-1093 (1985).

Initially, loans made under the Guaranteed Student Loan Program were fully dischargeable like all other

unsecured loans in bankruptcy. However, in 1978 Congress enacted the Bankruptcy Reform Act of 1978 which severely restricted the dischargeability of student loans. In particular, 11 U.S.C. § 523(a)(8) provided:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> * * *
>
> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution, unless –
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of a petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8) (1988) (subsection (a)(8)(A) was later extended from five to seven years).

This provision was enacted in response to the belief that students were taking advantage of the student loan program. In the early 1970s, there was concern by legislators and the public about the perceived rise in bankruptcy filings by students on the brink of successful careers. H.R.Doc. No. 137, 93rd Cong., 1st Sess., Parts I and II (1973). A nondischargeability provision was initially enacted as part of the Education Amendments of 1976 which added a new section to the Higher Education

Act of 1965. *See* Education Amendments of 1976, Publ. L. No. 94-482, 127(a), 90 Stat. 2081, 2141 (codified at 20 U.S.C. 1087-3 (1976)) (repealed 1978). However, this provision was repealed and replaced with the present section 523(a)(8) in 1978.

There was very little discussion of the nondischargeability provision either in the House or the Senate. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 79 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5865; 124 Cong. Rec. 28,284, 32,350-420, 34,143-45. Representative Ertel, the House sponsor from Pennsylvania, did make the following statement on the House floor as to the purpose of the provision:

> [The purpose is] to keep our student loan program intact . . . [T]he default rate in the student loan program has been escalating to tremendous proportions in the past year . . . [T]he number of students going into bankruptcy – or ex-students – has increased . . .
>
> * * *
>
> . . . Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education.

124 Cong. Rec. 1791-92. *See also,* Statement of Representative Erlenborn, 124 Cong. Rec. at 1793 (criticized debtors who "not having assets to pledge, [are] pledg[ing their] future earning power. Having pledged that future earning power, if, shortly after graduation and before having an opportunity to get assets to repay the debt, [they] seek to discharge that obligation, I say that is tantamount to fraud.")

This Court has not spoken as to its understanding of Congressional intent regarding section 523(a)(8). However, lower courts have noted that it is "significant that the debate in the main focused on the twin goals of rescuing the student loan program from fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors." *In re Pelkowski*, 990 F.2d 737, 743 (3rd Cir. 1993). Based upon these dual concerns, lower courts have recognized the higher standard adopted by Congress with respect to the dischargeability of student loans. *E.g., E'Ettore v. Devry Institute of Technology*, 106 B.R. 715, 718 (Bankr. M.D. Fla. 1989). Indeed, at least one court has stated that "[t]he extraordinary importance placed by Congress on repayment of educational loans impels this Court to place a heavy burden on debtors who would have such loans discharged." *In re Claxton*, 140 B.R. 565, 569 (Bankr. N.D. Okla. 1992).

B. Multiplicity Of Tests For Undue Hardship

This Court has not interpreted the meaning of "undue hardship" in 11 U.S.C. § 523(a)(8). Indeed, the intermediate appellate courts have noted that "there is very little appellate authority on the definition of 'undue hardship' in the context of 11 U.S.C. § 523(a)(8)(B)." *Brunner v. New York State Higher Education Services*, 831 F.2d 395, 396 (2nd Cir. 1987). As a result, a multiplicity of tests have been developed in the lower courts to determine what constitutes an "undue hardship." The differences in these tests has led to an inconsistency in results – sometimes effectuating the intent of Congress and sometimes running contrary to that intent as in the present case.

In *Brunner,* the Second Circuit Court adopted a three-part test which the debtor must meet:

> (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396. The Second Circuit test has been adopted by the Seventh Circuit. *In re Roberson,* 999 F.2d 1132, 1135 (7th Cir. 1993).

In the case of *In re Claxton,* 140 B.R. 565, 568 (Bankr. N.D. Okla. 1992), a bankruptcy court in Oklahoma notes four different tests:

> First, *In re Johnson,* 5 B.C. 532 (B.C., E.D. Pa. 1979), a case under the former Bankruptcy Act, set forth an elaborate three-part test which has been followed in many cases under the present Bankruptcy Code. This complex test requires a debtor to justify discharge of the debt in light of his financial history, resources and prospects, his behavior in bankruptcy, and policy considerations of the student loan program.
>
> Second, some courts, while ostensibly following *In re Johnson, supra,* have emphasized that the statute requires not only hardship but 'undue' hardship. These courts 'presume' that student loans are excepted from discharge even when debtors are in 'severe financial difficulties,' and require proof of 'truly severe and even uniquely difficult circumstances' to rebut

such presumption. *In re Craig*, 64 B.R. 854, 857 (B.C., W.D. Pa. 1986).

Third, *In re Bryant*, 72 B.R. 913 (B.C., E.D. Pa. 1987), reacting against the complexity of the *Johnson* formula and the severity of the 'uniquely difficult circumstances' rule, held that undue hardship would be presumed if debtor's income was 'at or near' the Federal Poverty Income Guidelines established by the Department of Health and Human Services; but undue hardship might also be found at higher income levels under 'unique and extraordinary circumstances.'

Fourth, some courts have refused rigid adherence to any particular 'test.' This Court is among them. In *In re Johnson*, 121 B.R. 91 (B.C., N.D. Okla. 1990), this court, per Convey, J., noted that " '[u]ndue hardship' means more than having a tight budget or present inability to pay, because most debtors could make such assertions;" but with this in mind, looked to "the totality of circumstances involved" in order to "manage the equities of each case [in] view of the legislative intent [and] policies of the Bankruptcy Code and the . . . student loan program," *id.* p. 93. The Court held that "tests" used and factors considered in other cases were relevant and might be persuasive, but should not be mechanically applied; the overriding factor is a well-informed judicial "discretion," so employed that "[a] case . . . succeeds or fails on its own merits and particular circumstances," *id.* This approach resembles the second "test" above, but is not so rigid and severe; it does not "presume," but merely weighs.

Other lower courts have adopted variants of these tests. *E.g., In re Wegfehrt,* 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981) ("The bankruptcy court must determine whether there would be anything left from the debtor's estimated future income to enable the debtor to make some payment on his/her student loan without reducing what the debtor and his/her dependents need to maintain a minimal standard of living."); *Andrews v. South Dakota Student Loan Assistance Corporation,* 661 F.2d 702, 704 (8th Cir. 1981) (adopted the *Wegfehrt* test); *Myers v. Pennsylvania Higher Education Assistance Agency,* 150 B.R. 139, 142 (Bankr. W.D. Pa. 1993) (fact that debtor has present inability to pay is not sufficient basis to permit dischargeability since financial uncertainty exists to some degree in every Chapter 7 case).

Application of these differing tests can produce and in this case does produce conflicting results. For instance, under the *Craig* test, the student loans are presumed to be exempt form discharge unless the debtors can provide proof of "truly severe and even uniquely difficult circumstances" to rebut the presumption. Since Mr. Cheesman is presently working with the potential for a promotion and Ms. Cheesman has obtained a degree and is able to work, the presumption is not rebutted. On the other hand, under the *Bryant* test, the fact that the debtors barely exceeded the poverty income guidelines for 1992 might be sufficient by itself to justify discharge of the student loans.

Even more interesting in this case is the fact that the majority and dissent purportedly applied the same test, i.e. the three-part test in *Brunner,* with differing results.

The difference in results is due to the fact that the majority placed the burden of establishing "undue hardship" upon TSAC whereas the dissent placed this burden upon the debtors. The majority noted as to the second factor, pertaining to the likelihood that the present state of affairs would persist in the future, that "there is no indication that the Cheesmans' financial situation will improve in the foreseeable future." (App. at 7a). This imposes the burden upon TSAC and *not* the debtors to establish that their future is likely to sufficiently improve to repay their student loans. On the other hand, the dissent stated:

> The second factor requires a debtor to show "by a fair preponderance of the evidence, that additional circumstances exist indicating that the described state of affairs is likely to persist for a significant portion of the repayment period . . . " *In re Healey,* 161 B.R. 389, 395-96 (E.D. Mich. 1993). "[T]he dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Matter of Robertson,* 999 F.2d 1132, 1136 (7th Cir. 1993). While predicting future income is difficult, as evidenced by the bankruptcy court's order to reexamine this issue 18 months later, the Cheesmans had the burden to establish "additional circumstances" that indicated a likelihood that their current inability to simultaneously repay the loans and maintain a minimal standard of living would extend for a significant portion of the loan repayment period. *Healey,* 161 B.R. at 396. The Cheesmans have not met this burden.

(App. at 13a).

Additionally, the majority and dissent disagreed on the third factor, *i.e.*, that the debtors made good faith efforts to repay the loans. Again, the majority placed the burden upon TSAC to prove bad faith by stating that "[t]here is no evidence that the Cheesmans did not act in good faith." (App. at 8a). On the other hand, the dissent notes that during the six-year period after the loans became due, the debtors made only two payments of $50.00 each and that "[t]here is no evidence that the Cheesmans sought the less drastic remedy of a deferment of payment on their debts before attempting to discharge them." (App. at 15a). *See Brunner,* 831 F.2d at 397 (finding that a debtor lacked good faith in attempting to discharge debt where she failed to seek a deferment of her loan); *In re Healey,* 161 B.R. at 389, 397 (Bankr. E.D. Mich. 1993) (finding debtor's attempt to discharge debt without first seeking to negotiate a payment arrangement with the lender evidenced bad faith). In considering good faith, it is relevant that the debtors admit that the reason for the Chapter 7 petition was to discharge the student loans. (App. at 31a). Such an action runs contrary to one of the prime goals of 11 U.S.C. § 532(a)(8)(B) to prevent the abuse of the bankruptcy process by debtors seeking to discharge their student loans.

There is no doubt that lower court decisions conflict on what constitutes "undue hardship" under 11 U.S.C. § 532(a)(8)(B). This Court has not addressed this issue in any of its decisions interpreting the Bankruptcy Code. On that basis alone, this Court should grant the petition for writ of certiorari.

C. Impact On State And Federal Governments

Resolution of the appropriate test for determining what constitutes an "undue hardship" will have a potentially significant fiscal impact upon all fifty states and the federal government vis-a-vis the Federal Family Education Loan Program. In Tennessee alone, the amount of the student loans sought to be collected by TSAC that went into bankruptcy for the past 5 years were as follows:

4/1/89 – 3/30/90	$1,625,163
4/1/90 – 3/30/91	2,982,628
4/1/91 – 3/30/92	3,730,585
4/1/92 – 3/30/93	4,576,173
4/1/93 – 3/30/94	2,879,413
TOTAL	$15,793,962
AVERAGE	$ 3,158,792

In addition to the impact on the states, the federal government is also directly affected. Pursuant to 34 C.F.R. § 682.402(d) & (h) (1992), if a student loan is discharged under bankruptcy, TSAC or other similar government agencies will normally receive reimbursement up to certain amounts from FFELP. In recent years, the high number of defaults in federally guaranteed student loans has placed the availability and solvency of educational loan programs in jeopardy. Defaulted loans cost the federal government $3.6 billion dollars in 1991, and the United States Department of Education estimated defaults on educational loans will cost an additional $2.9 billion dollars for the 1992 fiscal year. Elizabeth Shogreen, "U.S. Loan Program may Bar 9[illegible] Schools," Los Angeles Times, August 25, 1993. In 19[illegible], student loan defaults cost the government $2.5 billion dollars down from the

high of $3.6 billion dollars in 1991, but still alarming enough to motivate Congress to revamp the program. Since the student loan program's inception 25 years ago, $22 billion dollars has been lost in defaults with $14 billion lost in the last five years alone. Michael Winerip, "Billions for Schools are Lost in Fraud, Waste and Abuse", New York Times, February 2, 1994. Although it is impossible to know the precise amount of student loans discharged through bankruptcy, the amount is surely significant both to the 50 states and the federal government.

II. THE LOWER COURT IMPROPERLY CONCLUDED THAT 11 U.S.C. § 105(a) ALLOWS A FEDERAL BANKRUPTCY COURT TO POSTPONE FOR EIGHTEEN MONTHS MAKING A DECISION WHETHER TO DISCHARGE STUDENT LOANS OWED BY A DEBTOR ON THE BASIS OF UNDUE HARDSHIP.

No legal basis exists to support the lower court's finding that 11 U.S.C. § 105(a) authorizes a bankruptcy court to affirmatively delay for eighteen months rendering an opinion on the dischargeability of a debtor's educational loans to ascertain whether an "undue hardship" ultimately materializes, or continues to persist. While § 105(a) does grant a bankruptcy court the power to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code, § 105 does not grant unfettered equity powers to a bankruptcy court or allow a bankruptcy court to deprive creditors of rights or remedies available to them under the Bankruptcy Code. *E.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S.Ct. 963, 969, 99

L.Ed.2d 169 (1988); *Terex Corp v. Metropolitan Life Insurance Co.*, 984 F.2d 170, 173 (6th Cir. 1993).

The imposition of this eighteen month hiatus directly conflicts with the express purpose of 11 U.S.C. § 523(a)(8) to render educational loans nondischargeable unless the debtor affirmatively demonstrates in a court proceeding that the educational debts fall within one of the two exceptions to nondischargeability set forth at 11 U.S.C. § 523(a)(8)(A) & (B). The nondischargeability of educational loans is thus meant to be self-executing so that the holder of an educational loan will not be required to file a complaint to determine the dischargeability of any such loan. *United States v. Wood*, 925 F.2d 1580, 1582-83 (7th Cir. 1991). *See also*, S. Rep. No. 989, 95th Cong. 2d Sess 79 *reprinted in* 1978 U.S. Code & Admin. News 5787, 5865.

Once a debtor files an adversary proceeding with a bankruptcy court to challenge the presumption that an educational loan is not dischargeable on the basis of undue hardship, then the bankruptcy court should be required to address and resolve the issue so as to provide all parties concerned finality on the question of whether or not this educational loan is dischargeable. 11 U.S.C. § 523 contains absolutely no provision allowing a bankruptcy court to enter an order postponing this determination. While a determination of whether an undue hardship exists may involve an estimation of a debtor's future financial resources, *e.g. Myers v. Pennsylvania Higher Education Assistance Agency*, 150 Bankr. at 143, a bankruptcy court has no authority to hold the adversary proceeding in abeyance for eighteen months (or a shorter or longer period of time) to determine whether an undue

hardship abates or an undue hardship not yet in existence ultimately materializes.

The bankruptcy court's failure to make a final decision on dischargeability in this case is prejudicial to the interests of both TSAC and the debtors. If the bankruptcy court found these loans nondischargeable, TSAC could begin to take action to collect these educational loans and hopefully begin to receive payments on these loans from the debtors. On the other hand, if the Bankruptcy Court were to discharge these loans, TSAC would be entitled to obtain final reimbursement of these delinquent loans from the United States Department of Education. *See* 34 C.F.R. § 682.402(d) & (h) (1992). The bankruptcy court's decision, however, forecloses TSAC from pursuing either of these actions, and essentially leaves the case "in limbo." Nor are the debtors benefited by this eighteen month hiatus, since: (1) interest continues to accrue on these debts during this time; (2) the debtors are denied a "fresh start"; and (3) the debtors are left with the uncertainty of whether they will ultimately be responsible for having to repay these educational debts.

Finally, the lower court's decision opens a Pandora's Box concerning how far a bankruptcy court can go under § 105(a) before the bankruptcy court is required to reach a final decision on the dischargeability of educational loans. For instance, once the eighteen month "stay" in this case has expired, can the bankruptcy court impose another eighteen month hiatus if the debtors' financial position is still "cloudy"? Could a bankruptcy court in a case other than this one decide to wait longer than eighteen months, possibly two to three years, to determine whether a debtor's financial condition will improve?

Once a court determines that an educational loan is dischargeable on the basis of undue hardship, can TSAC or another educational lender revisit this question two to three years hence if the debtor's financial position dramatically improves? Indeed, what is now the status of this case – the bankruptcy court, whose decision was affirmed, intended to revisit the question of undue hardship after the passage of eighteen months, but the majority opinion of the Sixth Circuit has apparently concluded the debtors' educational loans are dischargeable.

All parties concerned, both educational lenders and debtors, are entitled to finality once the issue is squarely placed before the Court as to whether an educational loan should or should not be discharged on the basis of "undue hardship." The lower court's position would leave this question in limbo for an indefinite period of time with the possibility that the question can always be readdressed if the debtor's financial position improves or diminishes as time passes by. Accordingly, this Court should grant the petition for writ of certiorari on this issue.

CONCLUSION

Based upon the foregoing authorities and analyses, the petitioner urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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[Counsel of Record]

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APPENDIX

1. Opinion of the United States Court of Appeals for the Sixth Circuit (June 2, 1994).....1a

2. Order of the United States Court of Appeals for the Sixth Circuit Denying Petition for Rehearing and Rehearing En Banc (August 4, 1994).....16a

3. Memorandum of the United States District Court for the Middle District of Tennessee (January 12, 1992 [sic 1993]).....18a

4. Order of the United States Bankruptcy Court for the Middle District of Tennessee (April 21, 1992).....21a

5. Stipulations (March 24, 1992).....24a

6. Motion to Overturn Discharge (August 6, 1992).....31a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0185P (6th Cir.)
File Name: 94a0185p.06

No. 93-5500

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: DALLAS R. CHEESMAN; MARGARET J. CHEESMAN, *Debtors.*	ON APPEAL from the United States District Court for the Middle District of Tennessee
DALLAS R. CHEESMAN; MARGARET J. CHEESMAN, *Appellees,* *v.* TENNESSEE STUDENT ASSISTANCE CORPORATION, *Appellant.*	

Decided and Filed June 2, 1994

Before: MILBURN and GUY, Circuit Judges; and TIMBERS, Senior Circuit Judge.*

---

* Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

TIMBERS, Senior Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. GUY, Circuit Judge (pp. 10-13), delivered a separate dissenting opinion.

TIMBERS, Senior Circuit Judge. Appellant Tennessee Student Assistance Corporation (TSAC) appeals from an order entered in the Middle District of Tennessee, L. Clure Morton, District Judge, which (1) affirmed the bankruptcy court's order that appellees Dallas and Margaret Cheesman's student loans were dischargeable pursuant to 11 U.S.C. § 523(a)(8)(B) (1988 & Supp. IV 1992), and (2) affirmed the bankruptcy court's eighteen-month stay of its order discharging the Cheesmans' loans.

TSAC contends (1) that the loans do not impose an undue hardship as required by § 523(a)(8)(B), and (2) that the bankruptcy court did not have authority pursuant to 11 U.S.C. § 105(a) (1988) to stay its discharge order.

We affirm.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

On August 2, 1991, Dallas and Margaret Cheesman filed a Chapter 7 petition with the bankruptcy court. At that time, the Cheesmans had approximately $30,000 in outstanding debts, of which $14,267 was attributable to student loans guaranteed by TSAC. On November 20, 1991, the Cheesmans commenced an adversary proceeding to have their student loans discharged on the ground

that the loans imposed an undue hardship pursuant to § 523(a)(8)(B). At a hearing on March 30, 1992, the following facts were presented.

In 1983, Margaret obtained two student loans with a total principal amount of approximately $5,000. These loans were guaranteed by TSAC, a nonprofit corporation created to administer student assistance programs. In 1984, she received a bachelor of arts degree from Middle Tennessee State University (MTSU), where she majored in English. After a six-month grace period and a five-month extension, the loans became due in June 1985. The monthly payments on these loans totalled $68. Only two payments were made on these loans: a $50 payment in March 1990 and a $50 payment in June 1990.

Subsequent to her graduation from MTSU, Margaret worked intermittently as a teacher's aide in the Cumberland County Alternative School between 1989 and 1991. During the months that she was employed, she worked approximately 35 hours a week and received an average gross monthly salary of $651. She took maternity leave from this position in 1991. When she reapplied in June 1991, she was informed that her position was no longer available. She then began to receive $53 a week in unemployment compensation. She continued to seek employment and was placed on the Cumberland Board of Education's preferred hiring list.

In February 1985, Dallas Cheesman received a $3,500 loan to attend MTSU to study educational psychology. This loan also was guaranteed by TSAC. Previously, he had obtained a bachelor of science degree from Austin Peay State University. He withdrew from MTSU in 1985

to take a second job. After a six-month grace period expired in December 1985, he was required to begin making monthly payments of $54. He made two $50 payments on this loan – one in January 1988 and the second in September 1988.

From October 1986 through October 1988, Dallas earned a gross salary of $1,538 a month as the director of the Giles County Alternative School. From November 1988 through May 1990, he earned a gross salary of $1,632 a month as a family worker in the residential treatment program for emotionally disturbed children at Eckerd Family Youth Alternatives, Inc. At the time the bankruptcy proceeding was commenced, he was employed as an early intervention specialist at the Plateau Mental Health Center. He earned a gross salary of $1,123 a month. After deductions for taxes and health insurance, he received $960 a month. He testified that he hoped to receive a promotion within the near future. He also had received $200 a month for party-time work at the local Teens Against Drugs Center until funding for this program ran out in February 1992.

In 1991, the Cheesmans' gross income was $15,676, leaving them a net income of $13,720. They provided the court with an expense charge listing monthly expenses that totaled $1,594. Included in this chart was the $100 monthly tuition to send their 7-year old daughter to private school (they also have a 14-month old son). Dallas testified that relatives provided most of the money for their daughter's tuition. The Cheesmans sent their daughter to private school because they found the public schools unacceptable due to the threat of corporal punishment. Dallas also testified that their daughter had

asthma and required medical treatment. This accounted for the $140 in medical fees listed on the chart. He testified that, although their health insurance was paid by his employer, the family incurred various expenses related to their daughter's asthma condition because of their high deductible. The Cheesmans owned a 1988 Chevrolet Nova worth approximately $3,000. They made monthly payments of $350 on the car. There was $7,081 due on the car.

At the conclusion of the hearing, the court stated that "this [case] is probably as problematic a case as the [c]ourt has had". It found that the Cheesmans "are in a downward spiral and will continue to go deeper in debt". As a result, the court held that the student loans imposed an undue hardship on the Cheesmans. In view of the Cheesmans' potential for employment and financial improvement, however, the court placed the case on its docket to be called up for review in eighteen months. The court stated that it would determine whether discharge was still appropriate at that time. On April 21, 1992, the court entered a written order implementing its oral order.

TSAC appealed to the district court. On January 12, 1993, the district court affirmed the bankruptcy court's order. The district court construed the bankruptcy court's order as a stay of its decision that the loans were dischargeable. The court held that § 105(a) authorized the bankruptcy court to impose the eighteen-month stay. The court also affirmed the bankruptcy court's holding that exception from discharge would impose an undue hardship on the Cheesmans. This appeal followed.

II.

(A) UNDUE HARDSHIP

TSAC contends that Dallas and Margaret Cheesman's student loans were not dischargeable pursuant to § 523(a)(8)(B). They assert that the loans did not impose an undue hardship. This is a question of law subject to *de novo* review. *In re Roberson,* 999 F.2d 1132, 1134 (7 Cir. 1993).

Section 523(a)(8)(B) provides that an educational loan is not to be discharged unless "excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents". Congress designed this provision "to remedy an abuse by students who, immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans". *Andrews University v. Merchant (In re Merchant),* 958 F.2d 738, 740 (6 Cir. 1992); *In re Pelkowski,* 990 F.2d 737, 742 (3 Cir. 1993) (section 523 resulted from the concern about "the perceived rise in bankruptcy filings by students on the brink of lucrative careers").

Courts have used a number of tests in determining what constitutes an undue hardship. One test requires the debtor to demonstrate "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . . ; and (3) that the debtor has made good faith efforts to repay the loans". *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2 Cir. 1987)

(per curiam); *In re Roberson, supra,* 999 F.2d at 1135 (adopting the *Brunner* test).

Other tests have focused on "whether there would be anything left from the debtor's estimated future income to enable the debtor to make some payment on his/her student loan without reducing what the debtor and his/her dependents need to maintain a minimal standard of living' ". *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews),* 661 F.2d 702, 704 (8 Cir. 1981) (citing *In re Wegfehrt,* 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981)).

In its decision, the bankruptcy court did not state which test it used to determine that the Cheesmans' loans imposed an undue hardship. We believe, however, that the loans were dischargeable under any undue hardship test the court may have used in reaching its decision.

First, there was no indication that the Cheesmans were capable of paying the loans while maintaining a minimal standard of living. The Cheesmans' 1992 gross income of $15,676 exceeded by only a slim margin the government's 1992 poverty income guideline of $13,950 for a family of four. The expense chart presented by the Cheesmans demonstrated that they maintained a frugal lifestyle consistent with their low income. Despite this fact, the Cheesmans had a monthly deficit of approximately $400. Under these circumstances, we are satisfied that the Cheesmans could not maintain a minimal standard of living for their family if they were required to pay their loans.

Furthermore, there is no indication that the Cheesmans' financial situation will improve in the foreseeable future. True, Dallas testified that he was hoping for a

promotion at his current job, and Margaret testified that she was actively seeking employment. There is no assurance, however, that either will obtain their objectives. Moreover, Margaret's employment history does not indicate that the Cheesmans' financial condition would improve considerably if she obtained a position as a teacher's aide. At best, she worked only intermittently as a teacher's aide. She received only minimal wages before her position was eliminated. Also, the court properly considered the fact that Margaret's unemployment compensation would run out within two weeks of the hearing and that this would burden further the Cheesmans' financial situation.

There is no evidence that the Cheesmans did not act in good faith. This is not a case where the petitioner seeks discharge within a month of loans becoming due. *Brunner, supra,* 831 F.2d at 397. The Cheesmans made minimal payments on their loans several years after their loans became due and at least a year before filing for bankruptcy. Furthermore, the Cheesmans chose to work in worthwhile, albeit low-paying, professions. There is no indication that they were attempting to abuse the student loan system by having their loans forgiven before embarking on lucrative careers in the private sector. In light of these considerations, we hold that the Cheesmans' student loans imposed an undue hardship.

We agree with the bankruptcy court's holding that the Cheesmans' student loans were dischargeable pursuant to § 523(a)(8)(B).

(B) BANKRUPTCY COURT'S AUTHORITY TO STAY ITS DISCHARGE ORDER

TSAC contends that the bankruptcy court erred in failing to make a final determination of whether the loans were dischargeable. It asserts that the court did not have the equitable authority to postpone making a final determination of dischargeability. We disagree.

In deciding to revisit the dischargeability issue in eighteen months, the bankruptcy court did not state upon what ground it was authorized to delay making a final decision. Its order merely states that it "will review the plaintiffs' financial position in eighteen months to determine whether the undue hardship remains". We believe that the district court properly construed this order as a stay authorized by 11 U.S.C. § 105(a).

Section 105(a) provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title". Several courts have suggested that the bankruptcy courts have broad equitable powers to protect debtors pursuant to § 105(a). *River Hills Assocs., Ltd. v. River Hills Apartments Fund (In re River Hills Apartments Fund)*, 813 F.2d 702, 707 (5 Cir. 1987) (court may enjoin action against debtor's property upon expiration of 11 U.S.C. § 362 automatic stay); *Courtney v. Gainer Bank (In re Courtney)*, 79 B.R. 1004, 1013 (Bankr. N.D. Ind. 1987) (section 105(a) authorizes the court to extend the automatic stay imposed by § 362 to provide the debtor with "breathing room" upon a determination that student loans were nondischargeable). The cases cited by TSAC require only that the bankruptcy court exercise its § 105(a) discretion within the confines of

the Bankruptcy Code. *E.G., Wasserman v. Immormino (In re Granger Garage, Inc.)*, 921 F.2d 74, 77 (6 Cir. 1990) (bankruptcy court may not extend its subject matter jurisdiction under the guise of its equitable powers).

We believe that the bankruptcy court exercised its equitable power pursuant to § 105(a) in a manner consistent with the Bankruptcy Code. The court stated that this was as difficult a case as it had had to decide. Although the court decided that discharge was appropriate at the present time, it stayed its order on the ground that the Cheesmans' financial situation might improve in the near future, thereby making discharge unwarranted. In so doing, the court appropriately attempted to balance the bankruptcy Code's goal of providing a fresh start to the Cheesmans with Congress's goal of preventing abuse of the student loan program. We are satisfied that, on the facts of this case, the court acted within its § 105(a) discretion in granting an eighteen-month stay.

We agree with the bankruptcy court's stay of its discharge order.

III.

To summarize:

The bankruptcy court properly held that the Cheesmans' student loans were dischargeable pursuant to § 523(a)(8)(B) because the loans imposed an undue hardship. The court properly stayed its discharge order pursuant to the court's § 105(a) equitable authority.

Affirmed.

RALPH B. GUY, JR., Circuit Judge, dissenting. The court concludes that the Cheesmans' student loans are dischargeable pursuant to § 523(a)(8)(B) because requiring the Cheesmans to repay them would impose an undue hardship. The court then goes on to conclude that the bankruptcy court had the authority pursuant to § 105(a) to stay its discharge order. Since I disagree with both of these conclusions, I respectfully dissent.

While § 105(a) grants bankruptcy courts broad equitable powers, I do not believe this includes the power to effectively postpone a decision as to the dischargeability of a student loan. Neither a single case nor any authority that stands for such a proposition has been brought to the court's attention. The one case seemingly on point, which is quoted by the Cheesmans and cited by the court, *In re Courtney*, 79 B.R. 1004 (Bankr. N.D. Ind. 1987), is distinguishable. The court in *Courtney*, referring to its broad powers under § 105(a), held:

> [A]lthough [this court] cannot modify the terms and conditions of any educational loan found to be nondischargeable, it may, in the judgment, order that the automatic stay which would otherwise be vacated remain in effect for a period of time to give the Debtor additional "breathing room", postdischarge, based on the prospects that he will have sufficient net income in the reasonably foreseeable future to repay an educational loan, although he may not have such net income at the time of the judgment.

Id. at 1013. At the very most, this passage indicates a court, *after* finding a debt to be not dischargeable, may use its equitable powers to give the debtor additional "breathing room" before making repayments. I do not

dispute this proposition, and note that other courts have reached a similar conclusion. *See, e.g., In re Conner,* 89 B.R. 744 (Bankr. N.D. Ill. 1988) (finding the debt was not dischargeable, but ordering a deferment in the collection of the debt to allow the debtor time to reorganize financially). Postponing the repayment of a nondischargeable debt, however, is not the same as postponing the initial determination of whether the debt is dischargeable.

As the case currently stands, neither party benefits. If the court had ruled the debts were not dischargeable, TSAC could have taken actions to collect these loans and the Cheesmans would have known exactly where they stood. On the other hand, if the court had ruled the debts were dischargeable, then TSAC would have been entitled to reimbursement from the United States Department of Education, *see* 34 C.F.R. § 682.402(d) & (h) (1992), and the Cheesmans would have known that they were forever free from the burden of repayment. Here, however, as the case waits "in limbo," TSAC is foreclosed from taking any action, and the Cheesmans are left with the uncertainty of whether they ultimately will be responsible for having to pay these debts. Moreover, if a court can revisit a finding of undue hardship 18 months later, then does it not follow that, because a debtor's financial position could worsen, a court may also revisit a finding of nondischargeability at a later date?

I also disagree with the court's finding that requiring the Cheesmans to repay their loans would impose an undue hardship. The court bases this holding on the presence of three factors: (1) the Cheesmans could not maintain a minimal standard of living if they were required to repay their loans; (2) there is no indication

that the Cheesmans' financial situation will improve in the foreseeable future; and (3) there is no evidence that the Cheesmans did not act in good faith. Section 523(a)(8)(B) creates a presumption that student loans are nondischargeable in bankruptcy, and the burden of challenging that presumption falls on the debtor. *See, e.g., United States v. Wood*, 925 F.2d 1580, 1583 (7th Cir. 1991). In my view, the Cheesmans failed to carry their burden in establishing the existence of the second and third factors.

The second factor requires a debtor to show "by a fair preponderance of the evidence, that additional circumstances exist indicating that the described state of affairs is likely to persist for a significant portion of the repayment period. . . . " *In re Healey*, 161 B.R. 389, 395-96 (E.D. Mich. 1993). "[T]he dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Matter of Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993) (citation omitted). While predicting future income is difficult, as evidenced by the bankruptcy court's order to reexamine this issue 18 months later, the Cheesmans had the burden to establish "additonal circumstances" that indicated a likelihood that their current inability to simultaneously repay the loans and maintain a minimal standard of living would extend for a significant portion of the loan repayment period. *Healey*, 161 B.R. at 396. The Cheesmans have not met this burden.

The Cheesmans are not disabled. They are not ill. They are not elderly. They are both college trained. At the time of the bankruptcy hearing, Mr. Cheesman held a job,

and he testified that there was the possibility of a promotion with his current employer. Mrs. Cheesman is qualified to tutor or substitute teach, as she did prior to the filing of the Chapter 7 petition. These circumstances are inapposite of those in cases in which a court has found "additional circumstances" to exist. *See, e.g., Matter of Diaz*, 5 B.R. 253 (Bankr. W.D. N.Y. 1980) (student loan was dischargeable when debtor could only work half a day because of physical problems, was impoverished, partially deaf, cardiac, divorced from her institutionalized husband, and had several children, some of whom required psychiatric and dental care); *In re Bagley*, 4 B.R. 248 (Bankr. D. Ariz. 1980) (unemployed debtor subsisting at near welfare level, burdened with medical bills of a child with chronic respiratory illness whose condition required the care of the debtor and impeded her gainful employment, did not have any reasonable prospects of acquiring more wealth); *cf. In re Webb*, 132 B.R. 199, 201 (Bankr. M.D. Fla. 1991) (no additional circumstances existed to indicate a likelihood that current inability to find any work would extend for significant period of time when debtor was not disabled or elderly, and was "educated, experienced, and articulate"). The record does not support a finding that the Cheesmans have demonstrated their current adverse financial condition will persist for a significant time.

Moreover, I do not believe the Cheesmans proved they acted in good faith. As discussed in the court's holding, one element considered in evaluating a debtor's good faith is the effort the debtor has made to repay his or her loans. Here, during the six-year period after the loans first became due and payable, the Cheesmans made

only two $50 payments on each of their loans. There also is no evidence that the Cheesmans sought the less drastic remedy of a deferment of payments on their debts before attempting to discharge them. *See Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 397 (2nd Cir. 1987) (finding that debtor lacked good faith in attempting to discharge debt where she failed to seek a deferment of her loans); *Healey*, 161 B.R. at 397 (finding debtor's attempt to discharge debt without first seeking to negotiate a payment arrangement with the lender evidenced bad faith).

"Undue hardship" is not defined in the Bankruptcy Code. The term "undue hardship," however, indicates that the type of hardship involved in a particular circumstance must be significant. *See In re Phillips*, 161 B.R. 945 (Bankr. N.D. Ohio 1993). I do not believe the Cheesmans have carried their burden in demonstrating that circumstances will prevent their financial condition from improving in the future or that they have acted in good faith; thus, I would find the undue hardship requirements have not been met. I would therefore vacate the bankruptcy court's decision and remand with the instruction that the Cheesmans' student loans be declared non-dischargeable.

No. 93-5500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: DALLAS R. CHEESMAN; MARGARET J. CHEESMAN, Debtors	
DALLAS R. CHEESMAN; MARGARET J. CHEESMAN, Plaintiffs-Appellees, v. TENNESSEE STUDENT ASSISTANCE CORPORATION. Defendant-Appellant.	ORDER (Filed Aug. 4, 1994)

BEFORE: MILBURN and GUY, Circuit Judges; and TIMBERS,* Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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*Hon. William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Guy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk
illegible

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

TENNESSEE STUDENT ASSISTANT CORPORATION	)	NO. 2:92-0037
VS.	)	(Filed Jan. 12, 1992 [sic 1993])
DALLAS R. CHEESMAN AND MARGARET J. CHEESMAN	)	

MEMORANDUM

In this bankruptcy appeal, the court has conducted *de novo* review of all questions of law passed on by the bankruptcy judge. This court will affirm the bankruptcy court's ruling in this matter.

The record indicates that the defendants here, Dallas and Margaret Cheesman, filed a chapter 7 petition on 2 August 1991. They filed an adversary proceeding to determine whether the court should discharge their student loans under 11 U.S.C. § 523(a)(8)(B), the undue hardship provision. After a hearing, the bankruptcy court entered an order which stated in part:

> The Court announced its findings of fact and conclusions of law in open Court, and found that excepting the educational debt from discharge would cause undue hardship for the plaintiffs at this time. The Court also found that, because of the potential for employment and future improvement in the plaintiffs' financial situation, the matter should be placed on the docket and called up for further review in eighteen months.

IT IS THEREFORE ORDERED AND DECREED THAT:

1. Excepting the plaintiffs [sic] debt to the defendant would cause undue hardship for the plaintiffs at this time;

2. The Court will review the plaintiffs' financial position in eighteen months to determine whether the undue hardship remains; and

3. The defendant will make no collection efforts until after the Court has reviewed the plaintiffs' financial position.

The question this court must address is whether the bankruptcy court has the authority to issue this order, which this court construes as a stay. Congress constituted the bankruptcy courts under its substantive authority over bankruptcies; they are not Article III courts. Therefore, their authority must be derived by statute and by the inherent equitable powers they require in order to function as federal courts.

Bankruptcy courts have no specific statutory authority to reinstate a stay or order a new stay, but 11 U.S.C. § 105(a) states in general terms the broad outline of the power of bankruptcy courts:

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. . . . " There is a very serious question as to whether the statute grants the bankruptcy judge discretion to stay the final question of dischargeability of these debts to a later date. The restrictive view is that there is no such discretion; the expansive view is that there is. Several bankruptcy judges have adopted the expansive

view.[1] Although this court might have made a different determination as to dischargeability of these particular student loans, in view of Congress' concern about their collection, the court is persuaded to accept the expansive view and affirm the exercise of the bankruptcy judge's discretion.

This appeal will be dismissed. An appropriate order will be entered.

/s/ L. Clure Morton
L. CLURE MORTON
SENIOR U.S. DISTRICT
JUDGE

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[1] *E.g. River Hills Assocs. v. River Hills Apartments Fund*, 813 F.2d 702, 707 (5th Cir. 1987) (dicta) (court retains authority to enjoin action against property of the estate); *In re Terramar Mining Corp.*, 70 Bankr. 875, 877 (Bankr. M.D. Fla. 1987) (Court may not reinstate automatic stay, but new stay can be granted under broad equitable powers). *See generally* Leal, *The Power of the Bankruptcy Court: Section 105*. 29 South Texas L. Rev. 487, 519-524 (1988).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE	)	
DALLAS R. CHEESMAN and MARGARET J. CHEESMAN,	)	
Co-debtors and Plaintiffs,	)	Case # 91-07563-KL2-7
v.	)	Chapter 7
TENNESSEE STUDENT ASSISTANCE CORPORATION,	)	Adv. Pro. No. 91-00603
Defendant.	)	

ORDER

This matter came to be heard on the 30th day of March, 1992, on the plaintiffs' Complaint to Determine Dischargeability of Educational Loans, the answer of the defendant, the stipulations of the parties, and the testimony in open Court by the plaintiffs.

The Court announced its findings of fact and conclusions of law in open Court, and found that excepting the educational debt from discharge would cause undue hardship for the plaintiffs at this time. The Court also found that, because of the potential for employment and future improvement in the plaintiffs' financial situation, the matter should be placed on the docket and called up for further review in eighteen months.

IT IS THEREFORE ORDERED AND DECREED THAT:

1. Excepting the plaintiffs [sic] debt to the defendant would cause undue hardship for the plaintiffs at this time;

2. The Court will review the plaintiffs' financial position in eighteen months to determine whether the undue hardship remains; and

3. The defendant will make no collection efforts until after the Court has reviewed the plaintiffs' financial position.

ENTERED THIS 20 DAY OF April, 1992.

/s/ illegible
JUDGE

APPROVED FOR ENTRY:

/s/ Tom Beesley
TOM BEESLEY, TN REG. #013524
Attorney for plaintiff
111 E. Fourth St.
Crossville, TN 38555
(615) 484-2700

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion has been forwarded by first class U.S. Mail, postage prepaid, to Charlotte H. Rappuhn, Assistant Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37243-0485, on this 13th day of April, 1992.

/s/ Tom Beesley
TOM BEESLEY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

IN RE	)	
	)	
DALLAS R. CHEESMAN and MARGARET J. CHEESMAN,	)	Case #91-07563-KL2-7
	)	Chapter 7
Co-debtors and Plaintiffs,	)	Judge Keith M. Lundin
	)	
v.	)	
	)	Adv. Pro. No. 91-00603
TENNESSEE STUDENT ASSISTANCE CORPORATION,	)	
	)	
Defendant.	)	

STIPULATIONS

As evidenced by the signatures of their respective counsel below, the parties hereby stipulate and agree to the following matters:

1. During February, 1983 and December, 1983, Plaintiff Margaret Cheesman received two educational loans to attend Middle Tennessee State University from the Mid-South Bank and Trust Company and from the Murfreesboro Bank and Trust Company totalling a principal amount of $5,000. Attached as Exhibit A are true and exact copies of those two notes.

2. During February, 1985, Plaintiff Dallas Cheesman received an educational loan to attend Middle Tennessee State University from the Mid-South Bank and Trust

Company in the principal amount of $3,500. A true and exact copy of that note is attached as Exhibit B.

3. Dallas Cheesman was awarded a bachelor of science degree by Austin Peay State University in 1974, where he majored in biology and geology.

4. Dallas Cheesman obtained the educational loan at issue in this bankruptcy proceeding in January, 1985 to study educational psychology at Middle Tennessee State University. Mr. Cheesman withdrew from study in May, 1985 in order to take a second job.

5. Following a grace period of six months, Dallas Cheesman's educational loan first became due for payment on December 1, 1985.

6. The amount of monthly payment for Dallas Cheesman's educational loan was $54.55. Two $50 payments, made on January 11, 1988 and September 12, 1988, are the only payments Mr. Cheesman has made on these loans.

7. Margaret Cheesman was awarded a bachelor of arts degree in 1984 from Middle Tennessee State University, where she majored in English.

8. Following a grace period of six months and a forbearance period of five months, Margaret Cheesman's educational loans first became due for payment on June 25, 1985.

9. Margaret Cheesman was obligated to make a monthly payment of approximately $68 for her educational loans. Two $50 payments, made on March 30, 1990 and June 11, 1990, are the only payments she has made on these loans.

10. Margaret Cheesman's educational loans were the subject of a judgment entered against Plaintiffs in favor of Defendant on April 9, 1991 by the Cumberland County General Sessions Court in the amount of $9,164.37. This amount included Ms. Cheesman's two notes and capitalized interest for a total principal amount of $5,166.42, interest of $2,497.95, and attorneys' fees of $1,500. A true and exact copy of that judgment is attached as Exhibit C.

11. Plaintiffs Dallas and Margaret Cheesman filed a Chapter 7 petition on August 2, 1991.

12. Plaintiffs filed a Complaint to determine the dischargeability of their debts for student loans on November 20, 1991.

13. Defendant TSAC filed an Answer on December 18, 1991.

14. The total amount of unpaid principal and interest due TSAC as of August, 1991 was $14,267.18, which includes the following:

Dallas Cheesman loan:

Principal	$3,500
Int. on Aug., 1991	$1,401.08

Margaret Cheesman loan:

Principal	$5,000
Capitalized int.	$ 166.42
Int. at judgment (4/9/91)	$2,497.95
Attorney's fees	$1,500
Court costs	$ 75
Additional Int. on Aug., 1991	$ 126.73

15. Plaintiffs do not dispute the validity of the underlying claim.

16. Dallas Cheesman is employed as an Early Intervention Specialist by the Plateau Mental Health Center, where he earns gross pay of $1,123.20 monthly. Mr. Cheesman's net pay for this job is $960. This represents deductions for taxes and health insurance of $163.20.

17. Dallas Cheesman earned $200 per month by working part-time for the local Teens Against Drugs Center. Mr. Cheesman no longer holds this job because the funding for it ended on February 29, 1992.

18. Dallas Cheesman earned a gross pay of $1,632.08 and net pay of $1,372.74 from November, 1988 though May, 1990 working for Eckerd Family Youth Alternatives, Inc. as a family worker in the residential treatment program for emotionally disturbed children. Mr. Cheesman was terminated by mutual agreement with the project director.

19. Dallas Cheesman earned a gross pay of $1,538.46 and net pay of $1,170 from October, 1986 through October, 1988 working for Giles County Alternative School as Alternative School Director. Mr. Cheesman left to take a new job in his wife's hometown.

20. Plaintiff Margaret Cheesman is unemployed. She was employed as a teacher's aide in the Cumberland County Alternative School during the following periods: March, 1989 through May, 1989; December, 1989 through May, 1990; and October, 1990 through January, 1991. She worked 35 hours per week, starting at $4.00 per hour and ultimately reaching $4.65 per hour. She ultimately earned a gross monthly pay of $651 and a net monthly pay of $480. Mrs. Cheesman left for maternity leave and the job was no longer available when she reapplied in June, 1991.

21. Margaret Cheesman received $1,000 in unemployment compensation during the last year.

22. Last year, Plaintiffs' annual gross income was $15,676 and their annual net income was $13,720.

23. Plaintiffs are covered by health insurance through Dallas Cheesman's employer.

24. Plaintiffs' average monthly expenses are as follows:

Expenses:	Amount:
Rent	$ 250.00
Electricity	55.00
Heat	90.00
Water	25.00
Phone	50.00
Car Payment	350.00
Car Insurance	55.00
Groceries	300.00
Meals Out	15.00
Medicine	100.00
Clothes	20.00
Brake job (3 payments)	34.50
Gas	90.00
Child's school	100.00
Laundry	20.00
Doctor	40.00
Total:	$1,594.50

25. Plaintiffs have been contacted by the Internal Revenue Service that they allegedly owe taxes in the amount of $4,000 for 1989. Plaintiffs' tax liability for 1990 is not yet determined, but plaintiffs anticipate they may be subject to additional liability for that year.

26. Plaintiffs have no medical problems.

27. Plaintiffs own a 1988 Chevrolet Nova estimated to be worth $3,000. During these bankruptcy proceedings, Plaintiffs reaffirmed their car loan of $7,081.88, obligating them to a $350 monthly payment. Attached as Exhibit D is a true and exact copy of Plaintiffs' car loan. Attached as Exhibit E is a true and exact copy of a Declaration filed in connection with the reaffirmation agreement.

28. The parties agree that the monthly payments for an obligation of $14,267.18 at 9% interest are approximately as follows:

4 years	$355.04
8 years	$209.02
10 years	$180.74
15 years	$144.71
20 years	$128.37

Defendant TSAC does not agree to the relevance of these calculations because a decision as to the repayment schedule for Plaintiffs' school loans is not a part of this proceeding.

Respectfully submitted,

/s/ Tom Beesley
by CHR w/permission
TOM BEESLEY, ESQ.
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/s/ Charlotte H. Rappuhn
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(615) 741-2614

Dated: This 24th day of March, 1992.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE

In re

Dallas R. Cheesman and
Margaret J. Cheesman
Co-debtors and Plaintiffs

Case #
91-07563-KL2-7

MOTION TO OVERTURN DISCHARGE

Come the debtors, through their attorney, and respectfully move the Court to overturn the discharge which was entered in this matter on June 26, 1992. In support of their motion, they show the court as follows:

1. The debtors had initiated an adversary proceeding which sought the discharge for student loan indebtedness on the basis of undue hardship. The debtors prevailed in this court, and the court ordered that the financial status of the debtors be reviewed in 18 months.

2. The defendant, Tennessee Student Acceptance Corporation, appealed this court's ruling. That appeal has not yet been docketed by the District Court.

3. The defendants were apparently sent a copy of the Discharge, and have already taken steps to collect the student loan debt, including calling the debtor's employer as well as calling them at home.

4. If the debtors lose their case on appeal and are ordered to pay the student loans, they wish to reserve the right to reconsider the bankruptcy discharge. Because most of their debts are student loans, a discharge could prove meaningless and wasteful.

5. A copy of this Motion has been sent to all creditors and interested parties advising that if no objection is filed within ___ days, the court will enter an order granting the relief with no further notice.

PREMISES CONSIDERED, MOVANTS PRAY that the Court enter an Order overturning the discharge in this case until the case is finished.

Respectfully submitted,

/s/ Tom Beesley
TOM BEESLEY, TN REG. #13524
Attorney for movants
111 E. Fourth St.
Crossville TN 38555
615-484-2700

CERTIFICATE OF SERVICE

I certify that a copy of this Motion was sent to all parties on the attached matrix on August 6, 1992.

/s/ Tom Beesley
Tom Beesley